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Supreme Court, U.S.
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No. 96-1651

In The

Supreme Court of the United States

October Term, 1996

WCC ASSOCIATES, BIRTCHER/BCI,

Petitioners,

v.

HAWAII CARPENTERS TRUST FUNDS; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 745, AFL-CIO,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Hawaii

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a), preempts the use of a state mechanic's lien statute of general applicability to recover delinquent trust fund contributions?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The monies Respondents Hawaii Carpenters Trust Funds and the United Brotherhood of Carpenters & Joiners of America, Local 745, AFL-CIO (hereinafter collectively referred to as the "Trust Funds") are attempting to recover in these proceedings arose out of collective bargaining agreements (hereinafter referred to as "CBAs") signed by Yost Enterprises, Inc., an Arizona corporation (hereinafter referred to as "Yost"), and BCI General Contractors, a California corporation (hereinafter referred to as "BCI"), with the United Brotherhood of Carpenters & Joiners of America, Local 745, AFL-CIO. The terms of the CBAs required Yost and BCI to contribute employee benefit plan trust fund contributions to the respective benefit plans making up the Hawaii Carpenters Trust Funds. Both Yost and BCI were subcontractors on the Waikele Power Center construction project undertaken by WCC Associates, the fee owner.

Both Yost and BCI defaulted in their respective trust fund contribution obligations to the Trust Funds which resulted in the Trust Funds taking legal action to recover these monies due. Among the proceedings instituted by the Trust Funds were applications for mechanic's and materialmen's liens (hereinafter referred to as "lien applications") both filed with the Circuit Court of the First Circuit, State of Hawaii, on November 11, 1993, pursuant to § 507-41, *et seq.*, Hawaii Revised Statutes. These lien applications were designated by the court as M.L. No. 93-0139, in connection with the delinquency incurred by

BCI, and M.L. No. 93-0140, in connection with the delinquency incurred by Yost. Before the lien actions could come up for a probable cause hearing as to whether the lien should attach, Petitioner, Birtcher/BCI, one of the respondents in the lien action, filed motions to dismiss or in the alternative, for summary judgment in both lien applications on February 28, 1994. Petitioner WCC Associates joined in the motions. The State Circuit Court dismissed both lien applications based upon the contention that the lien applications were preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a). See Petitioners' Supplemental Appendix to Petition for Writ of Certiorari (hereinafter "Pet.Supp.App."), A – D. Appeals to the Hawaii Supreme Court were taken from the judgments dismissing both lien applications.

On September 10, 1996, the Hawaii Supreme Court issued an order of summary disposition, vacating the dismissals of the lien applications in Hawaii Supreme Court Docket Nos. 18489 and 18519 and remanding both actions for further proceedings consistent with its decision in *Hawai'i Laborers Trust Fund v. Maui Prince Hotel*, 81 Haw. 487, 918 P.2d 1143 (1996). See Petitioners' Appendix (hereinafter "Pet.App."), 1a-3a.[1] On October 10, 1996,

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[1] Pursuant to Rule 35 of the Hawaii Rules of Appellate Procedure, dispositional orders of the Hawaii Supreme Court shall not be published except upon order of the Court. An unpublished dispositional order does not have precedential effect except when the order establishes law of the pending case, res judicata, or collateral estoppel. Summary Disposition Order No. 96-13 was not designated by the Court for publication. *See* 925 P.2d 375.

judgments on appeal were entered in the Hawaii Supreme Court. Petitioners filed this Petition on January 8, 1997. The Hawaii Supreme Court, however, did not rule on certain objections made to Petitioners' attempted introduction of unauthenticated evidence such as the copy of a CBA which Petitioners' counsel attempted to qualify by the use of counsel's own incompetent affidavit alleging insufficient facts. The CBA and associated arguments put forth by Petitioners relying upon the terms of the CBA should thus be struck from the record below.

The question presented by Petitioners is whether ERISA preempts the use of Hawaii's lien application statute *"where there is no pre-existing judgment* and where liability to make those contributions is dependent on interpretation of ERISA provisions related to a collective bargaining agreement". See Petition (hereinafter "Pet."), p. ii (emphasis added). The Trust Funds object to the question presented, with regard to whether the Trust Funds were in possession of a judgment at the time the lien applications were filed. Petitioners did not argue before the Hawaii Supreme Court that ERISA preemption was warranted because no judgments were taken against Yost and BCI at the time the lien applications were filed in the Hawaii Supreme Court.[2] This issue was not before

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[2] If recovery of a judgment is somehow relevant, the deadline to recover a judgment against the debtor/employer ought to be the time the probable cause hearing begins, at the very earliest. Lien applications under the Hawaii mechanic's and materialman's lien law must be filed within 45 days of the filing of an affidavit showing publication of a notice of completion of contract. A probable cause hearing can be scheduled a year after the filing of the lien application if the

the Hawaii Supreme Court and is not properly before this Court if certiorari is granted. Sup.Ct.R.15.2. Trust Funds accordingly object to consideration of the question presented with regard to whether or not judgments were obtained in the proceedings below. Further, Petitioners failed to submit any admissible evidence in the State Circuit Court regarding the existence or non-existence of a judgment. If Petitioners had properly raised this issue in the Court below, Trust Funds could have taken steps to deal with the issue and the record below.[3] Therefore, this Court is presented with an incomplete record and cannot make a determination as to the question presented. To the extent this Court determines that resolution of the fact issues relative to the effect of the judgments on this case are necessary, this is an additional reason why certiorari should not be granted in this case. Petitioners did not

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matter is contested. *See* § 507-43(b), Hawaii Revised Statutes (Appendix A, p. 3).

[3] The fact is that the Trust Funds are in possession of judgments against BCI and Yost. Therefore, since judgments were taken against both BCI and Yost, a judgment will exist at the time the Trust Funds commence enforcement of the lien application with the holding of a probable cause hearing under the Hawaii lien law. Although these judgments are not in the record below, Trust Funds bring these facts to the Court's attention in view of Petitioners' phrasing of the question presented to improperly include matters they did not show proof of and preserve in the State courts below. In any event, the issue of whether or not the Trust Funds were in possession of judgments at the time the lien applications were filed has been waived by Petitioners and is not before this Court for consideration. The record below is without any admissible evidence to prove to the Hawaii Supreme Court that a judgment was not entered against either BCI or Yost.

properly raise or preserve this question before the Hawaii Circuit Court and the Hawaii Supreme Court and this Court cannot consider a question based on facts and arguments that were not presented in the proceedings below. *See Ernst & Ernst v. Hochfielder*, 425 U.S. 185, 194 n.13, *reh'g denied* 425 U.S. 986 (1976); *Tennessee v. Dunlap*, 426 U.S. 312, 314 n.2 (1976).

REASONS FOR DENYING THE WRIT

SUMMARY OF THE ARGUMENT

The question presented by this case is whether ERISA, 29 U.S.C. § 1144(a) preempts the use of Hawaii's Mechanic's and Materialman's Lien Law, Hawaii Revised Statutes ("HRS") § 507-42, to recover delinquent trust fund contributions. Hawaii's mechanic's lien statute is a law of general applicability which provides a general collection mechanism for all laborers and materialmen within the State to collect on amounts due and owing to the laborer or materialman for improvements made to real property. (*See* Appendix A, p. 1).

Petitioners contend that the mechanic's lien law is preempted by ERISA's preemption provision, § 514(a), 29 U.S.C. § 1144(a). The preemption clause provides, in relevant part, that ERISA " . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . . "

Petitioners contend that the State mechanic's lien law relates to an employee benefit plan and therefore the Hawaii Supreme Court erred in its holding in *Hawaii Laborers' Trust Funds v. Maui Prince Hotel*, 81 Haw. 487, 918

P.2d 1143 (Haw. 1996). As will be discussed below, Petitioners are incorrect in their interpretation and application of § 1144(a) to the state law in this case. Specifically, Petitioners do not take into account the legislative history behind the statute, the two most recent opinions of this Court on ERISA preemption,[4] nor do Petitioners address the decisions of this Court which address ERISA preemption of state laws which merely provide a general judgment collection mechanism.

Further, Petitioners' contention that the *Maui Prince Hotel* decision is in conflict with three different federal circuit courts of appeals decisions, is unfounded. The federal decisions were based on factually inapposite lien statutes and were decided prior to the more recent opinions of this Court, raising questions as to the continued viability of these opinions.

ARGUMENT

I. THE DECISION OF THE HAWAII SUPREME COURT DOES NOT CONFLICT WITH EXISTING ERISA DECISIONS

Petitioners contend that the Hawaii Supreme Court's decision in *Maui Prince Hotel* is erroneous because the Court disregarded the breadth of ERISA's preemption

[4] *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995); *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, ___ U.S. ___, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997). At the time of the submittal of the Petition, this Court had not yet decided the *Dillingham* case.

clause in holding that the mechanic's lien statute did not "relate to" or conflict with an ERISA plan. Specifically, Petitioners claim that the Hawaii Supreme Court's decision is contrary to the holdings of this Court that ERISA's preemption clause is "conspicuous for its breadth," and that the term "relates to" is to be broadly construed. Pet. 11-14. Contrary to the Petitioners' contentions, the *Maui Prince Hotel* decision appropriately applied the legislative history and decisions of this Court in determining that Hawaii's mechanic's lien statute was not ERISA preempted.

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995), a New York statute required hospitals to surcharge patients covered by certain commercial health insurance plans governed by ERISA. The District Court determined that the New York statute triggered ERISA preemption by virtue of the economic burden the statute would have on certain commercial health insurance carriers, thus meeting the "related to" test of § 1144(a). 115 S.Ct. at 1675. The Court of Appeals for the Second Circuit affirmed, relying on the broad interpretation of "relate to" by this Court in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992), and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). 115 S.Ct. at 1676.

In deciding that no ERISA preemption existed, this Court discussed the problems with its interpretation of the words "relate to" in its previous decisions. The Court stated that claims of preemption must first be addressed with the "starting presumption that Congress does not

intend to supplant state law." 115 S.Ct. at 1676 (citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). "Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, . . . , we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act *unless that was the clear and manifest purpose of Congress.*' " (emphasis added) (citations omitted) 115 S.Ct. at 1676. The Court then looked to Congress' intent and the text of the provision in question. The Court stated:

> The governing text of ERISA is clearly expansive. Section 514(a) marks for pre-emption 'all state laws insofar as they . . . relate to any employee benefit plan' covered by ERISA, and one might be excused for wondering, at first blush, whether the words of limitation ('insofar as they . . . relate') do much limiting. *If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere,' H. James, Roderick Hudson xli (New York ed., World's Classics 1980). But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality. That said, we have to recognize that our prior attempt to construe the phrase 'relate to' does not give us much help drawing the line here.*

115 S.Ct. at 1677 (emphasis added). The Court then noted that in *Shaw, supra*, it explained that a law relates to an ERISA plan "if it has a connection with or reference to such a plan," but that the term "connection with" was not

any more helpful in construing "relate to." *Id.* at 1677 (citing *Shaw*, 463 U.S. at 97). The Court stated:

> For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections. We simply must go beyond the unhelpful test and the frustrating difficulty of defining its key term, *and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.*

115 S.Ct. at 1677 (emphasis added).

The most recent decision of this Court concerning ERISA preemption is *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, ___ U.S. ___, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997).[5] In *Dillingham*, this Court summed up its ERISA decisions as follows:

> . . . Where a State's law acts immediately and exclusively upon ERISA plans, as in Mackey, or where the existence of ERISA plans is essential to the law's operation, as in Greater Washington Bd. of Trade and Ingersoll-Rand, that 'reference' will result in pre-emption.
>
> A law that does not refer to ERISA plans may yet be pre-empted if it has a 'connection with' ERISA plans. Two Terms ago, we recognized that an 'uncritical liberalism' in applying

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[5] This case is cited by Petitioners as support for their position. At the time of the submittal of the Petition, certiorari had been granted by this Court to review the decision of the Ninth Circuit Court of Appeals that California's prevailing wage law "related to" and was preempted by ERISA. *Dillingham Construction N.A., Inc., v. County of Sonoma*, 57 F.3d 712 (9th Cir. 1995), *cert. granted*, 116 S.Ct. 1145, 134 L.Ed.2d 541 (1996). Pet. 13.

> this standard offered scant utility in determining Congress' intent as to the extent of § 514(a)'s reach. Travelers, 514 U.S., at ___ (slip op., at 9). Rather, to determine whether a state law has the forbidden connection, we look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' ibid., as well as to the nature of the effect of the state law on ERISA plans, id., at ___ (slip op. at 12).

117 S.Ct. at 838. This Court then held that California's prevailing wage statute which altered the incentives, but did not dictate the choices facing ERISA plans was "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." *Id.* at 842.

The principles of ordinary field pre-emption and ordinary conflict pre-emption provide the standards by which this court should judge whether the Hawaii lien law is preempted. *Id.* at 843 (Scalia, J., Ginsburg, J. concurring). This position also appears to be the position of Justice Thomas. *Camp Newfound/Owatonna, Inc. v. Town of Harrison, Maine,* 1997 WL 255351 (U.S.) (May 19, 1997) p. 30, 31 (Thomas, J. dissenting). Being that 29 U.S.C. § 1145 does not provide "extensive legislation" which preempts the field of delinquent trust fund contribution collections, Hawaii's lien law cannot be characterized as being preempted by ERISA.

The objectives of the ERISA statute are well documented with respect to collection of delinquent trust fund contributions. Under ERISA, the trustees are empowered

to administer the various employee benefit plans and to see to the financial stability of the funds in order to protect the beneficiaries and plan participants. 29 U.S.C. § 1104(a)(1). By enacting the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA"), which inserted 29 U.S.C. § 1145 (ERISA § 515), into the law, the aim of Congress was to deal with the problems caused by employer delinquencies in multiemployer benefit plans, to promote prompt payment of contributions, and to assist plans in recovering the costs incurred in connection with delinquencies. Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S.1076, The Multiemployer Pension Plan Amendments of 1980: Summary and Analysis of Consideration (Comm.Print 1980) at 43-44. Congress never intended to prevent a plan from benefiting from utilization of a state's mechanic's lien law which does not act immediately and exclusively upon ERISA plans and where the existence of an ERISA plan is not essential to the law's operation. As stated expressly in the legislative history: "The Committee amendment does not change any other type of remedy permitted under State or Federal law with respect to delinquent multiemployer plan contributions." H.R.Rep.No. 869, 96th Cong., 2d Sess. (1980) Part II at 48-49, 4 U.S. Code-Congressional and Administrative News, 96th Cong. 2d Sess. at p. 3038. Thus, Congress has not been silent on the issue of preemption of state law utilized by employee benefit plans to recover delinquent trust fund contributions. Even if Congress had been silent on this issue, this Court's "preemption jurisprudence explicitly rejects the notion that mere congressional silence on a particular

issue may be read as preempting state law." *Camp Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 1997 WL 255351 (U.S.) (May 19, 1997) p. 30, 31 (Thomas, J. dissenting).

This Court addressed the issue of congressional intent with regard to the collection of delinquent plan contributions in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988). In *Mackey*, petitioners (the plan trustees) contended that the Georgia garnishment procedure which was used by a creditor of a participant to garnish funds held by an employee welfare benefit plan was pre-empted by ERISA. Like the Hawaii mechanic's lien statute, Georgia's general garnishment statute did not single out or specifically mention ERISA plans. The plan trustees argued that garnishment would impose additional administrative burdens and costs upon benefit plans and its trustees, and therefore the Georgia garnishment statute "relate[d] to" an ERISA plan. This Court disagreed and held that ERISA did not bar the garnishment action:

> . . . In our view, . . . , certain ERISA provisions, and several aspects of the statute's structure, indicate that Congress did not intend to forbid the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans, even when those mechanisms prevent plan participants from receiving their benefits.

486 U.S. at 831-32. *See also District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992) ("[p]re-emption does not occur, however, if the state law has only a 'tenuous, remote, or peripheral' connection with covered plans, . . . , as is the case with many laws of general

applicability. . . . ") 506 U.S. at 130 fn. 1 (citations omitted).

The Hawaii mechanic's lien statute, like the Georgia general garnishment statute, is a law of general applicability which does not "relate to" or have a connection with an ERISA plan. Moreover, in the present case, Hawaii's mechanic's lien statute allows the plans to collect delinquent contributions and does not impose hardships or burdens on the plan, as argued by the plan trustees in *Mackey*, and does not take funds out of the plan as in *Mackey*. The Congressional objectives and intent behind the ERISA statute are served by the Hawaii statute which actually aids the plans in collecting delinquent contributions.

II. THE DECISION OF THE HAWAII SUPREME COURT IS NOT ERRONEOUS

A. The Hawaii Supreme Court Correctly Applied The Precedents Of This Court And The Legislative Intent And Policy Objectives Of ERISA

The Hawaii Supreme Court held in *Maui Prince Hotel* that ERISA did not preempt the use of Hawaii's mechanic's lien statute as an enforcement mechanism for the collection of delinquent trust fund contributions. In that case, the Hawaii Laborers' Trust Funds ("HLTF") obtained judgments against a subcontractor for delinquent trust fund contributions in the United States District Court for the District of Hawaii. HLTF then filed an action in the Hawaii state court to enforce the judgments under the Hawaii mechanic's lien statute.

The Hawaii Supreme Court correctly applied the precedents of this Court to determine that Hawaii's mechanic's lien law did not "relate to" an employee benefit plan and was not expressly preempted by § 1144(a). Specifically, the Court found that under *Greater Washington* and *Mackey, supra,* a state law of general applicability like Hawaii's mechanic's lien statute is not expressly preempted by ERISA. 918 P.2d at 1152. The Hawaii Supreme Court, as an additional basis for its holding that the mechanic's lien statute did not "relate to" an employee benefit plan, also looked to *Plumber's Local 458 Holiday Vacation Fund v. Howard Immel, Inc.,* 151 Wis.2d 233, 445 N.W.2d 43 (Wis.Ct.App. 1989). In that case, the Wisconsin Court of Appeals held that the Wisconsin statute which provided for the use of a construction lien to collect delinquent contributions was not preempted by ERISA. 445 N.W.2d at 45. Like Hawaii's mechanic's lien statute, the Wisconsin construction lien law was a general statute without any specific reference to ERISA obligations; it merely provided a remedy to a certain class of creditors that existed independently of ERISA obligations. *Id.* Contrary to Petitioners' contention, however, the Hawaii Supreme Court did not rely "heavily" on the *Immel* decision, while choosing to ignore the holdings of the federal courts in making its decision. Pet. 10. Instead, the Hawaii Supreme Court analyzed and applied the precedents of this Court to determine whether Hawaii's mechanic's lien statute was preempted, and looked to *Immel* as further support for its decision. *Maui Prince Hotel,* 918 P.2d 1150-1154.

After determining that ERISA did not limit the use of state laws to permit recovery of delinquent trust fund

contributions, the Hawaii Supreme Court then addressed the issue of whether or not Hawaii's lien law was in conflict with ERISA. In connection with this determination, the Court looked to the purpose of ERISA's preemption provision. The Court analyzed the legislative history of ERISA and concluded:

> Given that the purpose of ERISA's preemption provision is to 'afford employers [or fund trustees of multiemployer benefit plans] the advantages of a uniform set of administrative procedures' in order to avoid 'the burden that would be imposed by a patchwork scheme of regulation,' see Fort Halifax Packing, 482 U.S. at 11-12, 107 S.Ct. at 2217, it does not follow that the fund trustees themselves are preempted from using a state law available to general creditors to collect money judgments.

918 P.2d at 1154.

The Hawaii Supreme Court further discussed the broad powers to collect fringe benefit contributions given to plan trustees under ERISA, including the responsibility for collecting contributions in a diligent, systematic, and reasonable manner, and specifically noted the enactment of the MPPAA to facilitate in the continuing problem of collecting employer contributions. *Id.* at 1153-55. The Court concluded that the use of Hawaii's mechanic's lien law to assist with the collection process was consistent with the objectives of ERISA and MPPAA.

Finally, the Hawaii Supreme Court stated that ERISA preemption of Hawaii's mechanic's lien law would ignore relevant Federal policy. The court stated that it "expressly recognized in *Hawai'i Carpenters' Trust Funds v. Aloe*

Development Corp., 63 Haw. 566, 633 P.2d 1106 (1981), that the trustees of employee benefit plans have a fiduciary duty to collect delinquent trust fund contributions, and accordingly, may utilize HRS § 507-42, *et seq.* in the discharge of their duties to the beneficiaries of the HLTF". *Id.* at 1156. Federal policy is entirely consistent with *Aloe*'s conclusion regarding the trustee's fiduciary duties. Accordingly, the Hawaii Supreme Court concluded that a determination that the trustees could not use the state lien law would "ignore relevant federal policy and fly in the face of logic." *Id.*

B. The Reference To ERISA In The Trust Funds' Applications For Mechanic's Liens Does Not Require Preemption

Petitioners contend that ERISA preemption is required because the Trust Funds state in their applications for mechanic's lien that Yost and BCI failed to pay the contributions mandated by their respective Collective Bargaining Agreements. Pet. 15-16. Petitioners contend that the mention of 29 U.S.C. § 1132(g)(2) in the lien application alone mandates ERISA preemption. Trust Funds object to the consideration of this argument because it was not made and preserved in the Hawaii Supreme Court. Sup.Ct.R.15.2. Petitioner also contends that the Trust Funds relied upon 29 U.S.C. § 1132(g) in the lien application. This is patently untrue. The mention of this statute merely informed the court of the underlying basis for additional liability of the delinquent employers under federal law. Section 1132(g) and Section 1145, both

remedial provisions, are not elements of the lien application claim nor were they relevant to a finding of probable cause for the lien application to be granted.

III. THE DECISION OF THE HAWAII SUPREME COURT PRESENTS NO CIRCUIT CONFLICT

Petitioners contend that the Hawaii Supreme Court decision conflicts with the decisions of three other federal circuit courts of appeal. Pet. 7, 10, 16. Specifically, Petitioners claim that the Hawaii Supreme Court's decision conflicts with the opinions reached on ERISA preemption of state lien laws in the following cases: *Trustees of the Electrical Workers Health and Welfare Trust v. Marjo Corporation*, 988 F.2d 865 (9th Cir. 1993); *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13 (1st Cir. 1991); *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548 (5th Cir. 1990).

The continued validity of these decisions is now questionable in view of this Court's holdings in *Blue Cross* and *Dillingham*. *Cf. Gee v. Southwest Airlines*, 110 F.3d 1400, 1409-1410, (9th Cir. 1997) (O'Scannlain, J., concurring).[6] The Courts in *Marjo, McCoy* and *Terotechnology* did

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[6] In *Gee*, Judge O'Scannlain, in his concurring opinion, recognized that earlier decisions of this Court broadly interpreting "relating to" under ERISA may no longer control. *Id.* Recent state and federal court decisions are also recognizing the more current decisions of this Court and its reasoning in finding that collateral actions (i.e., actions other than claims under 29 U.S.C. § 1145 against employers) to recover delinquent trust fund contributions are not preempted by 29 U.S.C. § 1144(a). The New Jersey Supreme Court in *Board of Trustees of*

not start from the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear manifest purpose of Congress", *Blue Cross*, 115 S.Ct. 1671, 1676, and instead, based their holdings on the prior decisions of this Court that ERISA was to be given a broad and expansive interpretation so that any state law which could conceivably in any manner affect an ERISA plan would be preempted. Moreover, the lien laws in *McCoy* and *Terotechnology* are distinguishable from the Hawaii lien law in that the statutes in both those cases specifically granted preferential treatment to ERISA plans. *McCoy*, 950 F.2d at 16; *Terotechnology*, 891 F.2d at 556. The Court in *Marjo* did not look to the Congressional objectives behind ERISA in connection with the Nevada lien statute,[7] but rather determined that under the prior precedents of this Court, the lien law "related to" an ERISA plan, even though the statute was not specifically designed to affect an ERISA plan, because the statute was used to supplement the collection mechanisms available under the plan. 988 F.2d at 867. The test for ERISA preemption of the Ninth Circuit Court in *Marjo* is now archaic in light of the more recent decisions by this Court.

Operating Engineers Local 825 Fund Service Facilities v. L.B.S. Construction Co., Inc., 148 N.J. 561, 691 A.2d 339 (1997) notes "a trend in recent federal precedent that has qualified the broad language of *Shaw* and has limited ERISA preemption of generally applicable state laws," and summarizes these recent decisions. *Id.* at 342.

[7] The Ninth Circuit Court in *Marjo* summarily dismissed the trustees' arguments that Congress narrowed the ERISA preemption provisions when it enacted the 1980 amendments to ERISA. 988 F.2d at 868.

Based on this Court's holdings in *Blue Cross* and *Dillingham* courts must now "go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Blue Cross*, 115 S.Ct. at 1677. In looking at the objectives of the ERISA statute, it is clear that a state mechanic's lien law of general applicability which assists plan trustees in collecting delinquent contributions is consistent with Congress' purpose of protecting participants' rights. The indirect recovery of delinquent trust fund contributions from persons other than the delinquent employer does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself. No uniform practice of the plan is directly or indirectly influenced by monies recovered from parties other than the delinquent employer. Further, the use of Hawaii's mechanic's lien law would not interfere with establishing a "uniform body of benefits law." *See Ingersoll-Rand*, 111 S.Ct. at 484. Moreover, the lien law assists the plans in collecting delinquent contributions as is required under ERISA without increasing the "administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Id.* The Hawaii mechanic's and materialman's lien law is a mere tool which the Trust Funds can elect to exercise, not a directive to the Trust Funds to comply with state law.

In view of this Courts' holdings in *Blue Cross* and *Dillingham*, and the legislative history behind ERISA and the MPPAA, the Hawaii Supreme Court correctly applied

the precedents of this Court to the particular state lien statute. To the extent any of the decisions cited by Petitioners conflict with the decision of the Hawaii Supreme Court, they are distinguishable upon their facts and/or are in conflict with the most recent decisions of this Court.

CONCLUSION

The decision of the Hawaii Supreme Court below is in full accord with the underlying ERISA preemption jurisprudence of this Court. For these reasons, Respondents respectfully urge the Court to deny the petition for writ of certiorari sought by Petitioners in this case.

Respectfully submitted,

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APPENDIX A

CHAPTER 507. LIENS
PART II. MECHANIC'S AND MATERIALMAN'S LIEN

§ 507-42 When allowed; lessees, etc.

Any person or association of persons furnishing labor or material in the improvement of real property shall have a lien upon the improvement as well as upon the interest of the owner of the improvement in the real property upon which the same is situated, or for the benefit of which the same was constructed, for the price agreed to be paid (if the price does not exceed the value of the labor and materials), or if the price exceeds the value thereof or if no price is agreed upon by the contracting parties, for the fair and reasonable value of all labor and materials covered by their contract, express or implied.

Where the terms of a lease, contract of sale, or instrument creating a life tenancy require the improvement of the real property, the interest of the lessor, vendor, or remainderman in the improvement and the land upon which the same is situated shall likewise be subject to the lien, and any provision for forfeiture or other penalty against the lessee, vendee, or life tenant in case of the filing of a mechanic's or materialman's lien or actions to enforce the same, shall not affect the rights of lienors.

§ 507-43 Filing notice, contents.

(a) Requirements. Any person claiming a lien shall apply therefor to the circuit court of the circuit where the property is situated. Such "Application For A Lien" shall

be accompanied by a written "Notice Of Lien" setting forth the alleged facts by virtue of which the person claims a lien. A copy of the Application and Notice shall be served in the manner prescribed by law for service of summons upon the owner of the property and any person with an interest therein and upon the party or parties who contracted for the improvements if other than the owner of the property or any person with an interest therein. If any person entitled to notice cannot be served as herein provided, notice may be given the person by posting the same on the improvement. The Application shall set forth the amount of the claim, the labor or material furnished, a description of the property sufficient to identify the same, and any other matter necessary to a clear understanding of the claim. If the claim has been assigned, the name of the assignor shall be stated. The Application shall specify the names of the parties who contracted for the improvement, the name of the general contractor and the names of the owners of the property and any person with an interest therein. The Application may (but need not) specify the names of the mortgagees or other encumbrancers of the property, if any, and the name of the surety of the general contractor, if any.

The Application and Notice shall be returnable not less than three nor more than ten days after service. On the return day, a hearing shall be held by the court to determine whether probable cause exists to permit the lien to attach to the property. Any person to whom notice is required to be given shall be permitted to offer testimony and documentary evidence on the issue of whether probable cause exists to permit the lien to attach. If the

person who contracted for the improvement from which the requested lien arises claims a set-off against the lienor or if any person to whom notice is required to be given otherwise disputes the amount of the requested lien, the court shall hear and receive all admissible evidence offered and shall only permit the attachment of a lien in the net amount which the court determines is the reasonable probable outcome of any such dispute. The return day hearing may be continued at the order of the court so that the entire controversy need not be determined on the originally scheduled return day. The lien shall not attach to the property until the court finds probable cause exists and so orders. No such order shall be entered before the Application and Notice have been served on the party contracting for the improvement, the general contractor and the owner of the property, and they were given an opportunity to appear at the hearing.

(b) Time for filing. The Application and Notice shall be filed not later than forty-five days after the date of completion of the improvement against which it is filed. Where title to the property involved, or any portion thereof, is registered in the land court it shall be incumbent upon the lienor to file a certified copy of the Order Directing Lien To Attach in the office of the assistant registrar of the land court within seven days after the entry thereof in order to preserve the lienor's rights against subsequent encumbrancers and purchasers of the property.

(c) Joint owner. If the fee title to the land involved is held in joint or common ownership or as an estate by the entirety, service upon one of the owners of the Application and Notice in accordance with this section shall be

deemed service upon all of the owners. Likewise, if the parties who contracted for the improvement, if other than the owner of fee title to the property involved, hold their interest in the premises in joint or common ownership, or as an estate by the entirety, service upon one of the parties of the Application and Notice in accordance with this section shall be deemed service upon all of the parties.

(d) Owner acting through attorney-in-fact. In cases where materials have been furnished or labor was performed at the request, or upon the order, of a person acting under a duly executed and acknowledged power of attorney from the owner and (1) the power of attorney has not been revoked, or (2) the power of attorney has been revoked subsequent to the furnishing of materials and labor upon request or order and the owner cannot be found within the State, service of the Application and Notice upon the person acting under the power of attorney shall be deemed service upon the owner.

(e) Duration of lien. The lien shall expire three months after the entry of the Order Directing Lien to Attach unless proceedings are commenced within that time to collect the amount due thereon by enforcing the same.

(f) Date of completion, notice of. The term "date of completion" as used in this section means the time when the owner or the general contractor for the improvement completes the publication of a notice that the improvement has been completed or has been abandoned and an affidavit of the publication, together with a copy of the notice has been filed in the office of the clerk of the circuit

court where the property involved is situated; provided that notice of completion shall not be effective for any purpose unless prior to the notice there has been substantial completion of the improvement or the improvement has been actually abandoned; and provided further that the notice shall not be published by the contractor until after the contractor has first made written demand upon the owner to publish the notice and the owner has failed to publish the notice within five days from the date of the demand. The publication of the notice by the contractor or the owner shall not be construed as an admission by either that the improvement has been satisfactorily completed. The notice required herein shall be published twice, seven days apart, in a newspaper of general circulation, printed and published in the county in which the property involved is situated, and the publishing newspaper shall promptly file the affidavit of publication above mentioned in the office of the clerk.

(g) Failure to file or publish notice. If a valid notice of completion is not published and filed within one year after the actual completion or abandonment of the improvement the "date of completion" shall be deemed to be one year after actual completion or abandonment.